GC GUIDANCE: MODEL ARBITRATION PROVISION

The Office of General Counsel released, in February, guidance concluding that M&O contractors are permitted to include arbitration clauses in their subcontracts. We also indicated that we would draft a model arbitration provision that contractors could use at their discretion. That provision appears below. Please note the following:

1. The provision is a general model for the use of the DOE/NNSA M&Os in their subcontracting activities. It is not intended for use between the M&O contractors and DOE, nor in other DOE/NNSA prime contracts. The current contract provisions in prime contracts, including the disputes provisions, remain unchanged.

2. The model is also not intended to modify the DOE/NNSA contracting officers' authority or role in normal oversight of the laboratory and facility M&O contract. As has previously been the case, M&O subcontracts should be submitted for review to the appropriate DOE/NNSA official(s).

3. The model presumes compliance with 10 C.F.R. Part 719, Contractor Legal Management Requirements, which include management of arbitration.[1] In addition, it does not imply any change in the methods generally used by DOE/NNSA to evaluate the M&O contractors' claimed costs.

4. This provision is only a "model," it can be modified as needed. Moreover, it does not in any way require a contractor to use binding arbitration. It merely underscores that arbitration is permissible where the parties deem it desirable.[2] In the event the parties deem other methods of alternative dispute resolution preferable, the Department does not object to their use either.

5. The model presumes that the only form of relief available is a monetary award. Any other form of relief should be discussed with DOE/NNSA counsel because it is important to ensure that an arbitrator does not order relief which is contrary to Departmental requirements for the prime (M&O) contractor.

6. The Department believes that the United States Civilian Board of Contract Appeals (CBCA) will often be a good forum for arbitration, given that body's expertise and comparative low cost. DOE/NNSA are working on an MOU with the CBCA to allow contractors to use this forum.

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[1] A separate question was raised about ¶ 4.0 of the Appendix to 10 C.F.R. Part 719, which states that "[w]hen a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants." That statement is not part of the regulation itself and although the parties are free to set such a rule, they are not required to do so.

[2] Paragraph 4.0 of the Appendix to 10 C.F.R. Part 719 states that "[t]he Department anticipates that mediation will be the principal and most common method of alternative dispute resolution" but that "[i]n exceptional circumstances, arbitration may be appropriate." The Department now believes, however, that this decision is generally best left to the parties.

7. The Department suggests avoiding an arbitration requirement for employment disputes. Binding arbitration is already included, however, in many collective bargaining agreements, and there is no intent to diverge from its use as required in those agreements.

8. The Department reminds M&O contractors that all costs associated with an arbitration proceeding must be identified and segregated by the M&O contractor sufficiently to enable the Department to make an accurate determination of their allowability. The issuance of the model clause does not imply that all costs associated with a particular arbitration proceeding will be deemed allowable, reasonable, and allocable under the prime contract.

Model Provision: Settlement of Disputes

Arbitration. Any claim for monetary damages arising out of or relating to this contract, or the breach thereof, may be submitted for resolution to [Name of Arbitration Organization] and shall be resolved by [Name of Arbitration Organization] in accordance with its rules of procedure (except as such rules may be otherwise modified herein by written agreement of the parties).

Remedy. Any such arbitral award shall be in satisfaction of all claims for money damages, by either party against the other, arising out of the same factual circumstance.

Confidentiality. Except as may be otherwise required by law or order of a court of competent jurisdiction, neither a party nor an arbitrator may disclose the existence, content, or result of any proceeding hereunder without the prior written consent of both parties. However, the content and result of an arbitration proceeding will be disclosed to the DOE/NNSA contracting officer and may be reviewed by DOE/NNSA counsel. The confidentiality of all proceedings shall be preserved by the parties.

Finality. All arbitration proceedings shall be final, binding, and enforceable in any court of competent jurisdiction. Except as otherwise prescribed in sections 9-11 of the Federal Arbitration Act, Pub. L. No. 68-401 (1925) (codified as amended at 9 U.S.C. § 1 *et seq.*), there shall be no opportunity for judicial review of arbitral decisions rendered. The award of the arbitrator(s) shall be accompanied by a reasoned opinion, issued in writing. Judgment on the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction.

Fees. Each party shall be responsible for its share of the arbitration fees in accordance with the applicable rules of arbitration, and shall also be responsible for its own attorney's fees. In the event a party fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including reasonable attorney's fees, for having to defend or enforce the award.

Office of the General Counsel
25 October 2010